

# Louisiana Law Review

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Volume 37 | Number 2

*The Work of the Louisiana Appellate Courts for the  
1975-1976 Term: A Symposium  
Winter 1977*

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## Public Law: Criminal Law

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### Repository Citation

Roger Stetter, *Public Law: Criminal Law*, 37 La. L. Rev. (1977)

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## CRIMINAL LAW

*Roger Stetter\**CONSTRUCTIVE POSSESSION OF MARIJUANA: JUDGE-MADE  
PRESUMPTIONS AND EVEN-HANDED JUSTICE

Decisions from another jurisdiction may be persuasive authority when a court of the forum says so. Last term, the Supreme Court of Louisiana gave its imprimatur to the decisions which hold that while presence on private premises where drugs are found does not constitute the crime of possession, keeping such premises does. A social guest found in a compromising situation in the locked bedroom of his friend's apartment had his conviction for simple possession of marijuana<sup>1</sup> reversed albeit drugs were conspicuously present on a kitchen counter top of the friend's apartment;<sup>2</sup> similar treatment was afforded temporary lodgers at a house found to contain small amounts of marijuana in several locations of the house including on a serving tray in a kitchen cabinet;<sup>3</sup> but a high school lad out for a drive with friends in his father's automobile had his conviction for possession of marijuana affirmed where a painstaking search by police disclosed gleanings of marijuana scattered about the car which were so miniscule that "they could not be employed to make even one miniature marijuana cigarette."<sup>4</sup> In the former "visitor" cases<sup>5</sup> the court held that defense-based motions for directed verdict should have been granted since no evidence of "constructive possession," a "term of legal art,"<sup>6</sup> had been

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1. LA. R.S. 40:966D (Supp. 1972).

2. *State v. Cann*, 319 So. 2d 396 (La. 1975). Defendant and his female date were naked in one of the bedrooms of the apartment when police officers kicked open the door. See transcript of testimony taken before Judge Fred Fudickar, Jr. of the Fourth Judicial District Court for the Parish of Ouachita, found in Record, *State v. Cann*, Doc. No. 56266 at 28, 32-33, 60-61 (filed June 26, 1975, Supreme Court of Louisiana [hereinafter cited as CANN TRANSCRIPT]).

3. *State v. Alford*, 323 So. 2d 788 (La. 1975). The transcript of testimony taken before Honorable Robert T. Farr, Judge of the Fourth Judicial District Court for the Parish of Ouachita, is found in Record, *State v. Alford*, Doc. No. 56226 (filed May 9, 1975, Supreme Court of Louisiana) [hereinafter cited as ALFORD TRANSCRIPT].

4. *State v. Mims*, 330 So. 2d 905, 914 (La. 1976) (Calogero, J., dissenting).

5. See notes 2 and 3, *supra*.

6. *State v. Cann*, 319 So. 2d 396, 397 (La. 1975). The court defines the term as "describing the situation in which a person, not in physical possession of a thing, can, nevertheless be considered to be in legal possession of the thing." *Id.* at 397. In the

mustered by the state.<sup>7</sup> In the latter "host" case,<sup>8</sup> upholding the conviction

words of one treatise writer, paraphrasing a state court opinion, "[i]t is a legal conclusion, derived from factual evidence, that someone who does not have physical possession of a thing in fact, has legal possession of that thing." See F. BAILEY & H. ROTHBLATT, *HANDLING NARCOTIC AND DRUG CASES* 45 & n.49 (1972) [hereinafter cited as BAILEY & ROTHBLATT]. An earlier Louisiana case indicates that a person will be deemed to be in constructive possession of a drug "if it is subject to his dominion and control." See *State v. Smith*, 257 La. 1109, 1114, 245 So. 2d 327, 329 (1971).

In addition to the two kinds of possession, actual and constructive, the law also recognizes that possession may be sole or joint. See jury instruction in *United States v. Sawyer*, 294 F.2d 24, 29 n.3 (4th Cir. 1961) (defendant, ostensibly sleeping when co-defendants, in dead of night, transported and unloaded property in his garage, jointly convicted of possessing same with intent to manufacture moonshine liquor where facts indicated delivery was by prearrangement). Joint possession may be actual physical possession by all defendants, for example, where they are caught carrying a quantity of drugs; it may be actual as to one or more and constructive as to the rest, see, e.g., *United States v. Sawyer*, *supra*; *Garza v. United States*, 385 F.2d 899 (5th Cir. 1967) (defendant in possession of heroin transported in his automobile although another man caught holding the bag of heroin outside defendant's car when customs officers arrived); it may be constructive as to all defendants, see, e.g., *Blaylock v. State*, 171 Tex. Crim. 665, 352 S.W.2d 727 (1961), discussed in text at note 33, *infra*, as the state sought to prove in the visitor cases, notes 2 and 3, *supra*. See also BAILEY & ROTHBLATT at 54. Occasionally, a court is faced with the difficult task of allocating responsibility for possession of various drugs seized among defendants jointly charged. See, e.g., *United States v. Davis*, 329 F. Supp. 493 (W.D. Pa. 1971) (daughter, in whose apartment drugs were seized in plain view on a kitchen table, jointly guilty of constructive possession of same with co-defendant father who was attempting to "wash away" evidence by pouring water on heroin powder and glassine envelopes located on table when police announced their presence; father alone guilty of possession of heroin seized from his pants pockets; daughter alone guilty of constructive possession of glassine envelopes of heroin found beneath windowsill in kitchen).

7. Facts brought out on the trial of *State v. Alford*, 323 So. 2d 788 (La. 1975), indicate that both the majority and the written dissenter, Mr. Justice Summers, may have taken liberties in their characterizations of the state's proof. The majority's "no evidence" characterization is debatable in view of testimony by one of the detectives that he found two empty prescription bottles bearing defendants' names in the same cardboard box that contained a water pipe, later established to have microscopic quantities of marijuana upon it. *Id.* at 789 n.1. Such physical evidence linking the accused to drugs is sometimes deemed sufficient to establish his constructive possession thereof. Compare *Haynes v. State*, 475 S.W.2d 739 (Crim. App. Tex. 1972) (discussed in text at note 31, *infra*) with *People v. Davenport*, 39 Mich. App. 252, 197 N.W.2d 521 (Mich. 1972) (nonexclusive residency in house plus presence of prescription bottle bearing defendant's name in laundry barrel containing bottle of heroin capsules located in basement of house, insufficient to support possession of heroin conviction). However, the court may well have concluded that said testimony was a fabrication by the state's witness because of his fellow detective's contrary testimony. See ALFORD TRANSCRIPT, *supra* note 3, at 12-14. The dissenter erred in the opposite direction by laying great stress on nonexistent

for constructive possession by the automobile driver, the court relied upon the common presumption employed in the cases<sup>9</sup> that where illegal drugs are found on "premises" under the control of the accused, here the automobile which defendant was operating and which he regularly used to go to school, possession and knowledge of the presence of the drug<sup>10</sup> as well as of its narcotic character<sup>11</sup> may be inferred. The purpose of this commentary is to demonstrate that the rigid two-tier review in constructive possession cases, exemplified by the foregoing decisions, is unsound.

Based upon its review of federal and state cases "in order to learn, if we can, what facts will support findings of constructive possession,"<sup>12</sup> the court in the visitor cases distilled the following principle:

In order to convict a person on the basis of constructive possession, something more than mere presence in the area where the drug is found or mere association with the person in actual custody of the drug must be shown.<sup>13</sup>

With this statement of principle by an unanimous court the writer is in

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evidence regarding defendants' alleged rapid-fire getaway from the house being searched. *See* State v. Alford, 323 So. 2d 788, 792 (La. 1975). The officers' testimony in respect to alleged flight by defendants was stricken from the record upon proper objection by defense counsel when it turned out to be based on nothing more than wishful thinking on their part. *See* ALFORD TRANSCRIPT, *supra* note 3, at 16, 24.

8. See note 4, *supra*.

9. See text at notes 41, 43, 46-49 and 51, *infra*.

10. Knowing possession, not to be confused with intent or guilty knowledge, is probably constitutionally required before one may be convicted of a possession-type crime. *See* Baender v. Barnett, 255 U.S. 224 (1921) (statute declaring that whoever, without lawful authority, shall have in his possession any die which could be used in counterfeiting U.S. coin shall be punished, must be read to make criminal a possession which is conscious and willing to avoid possible unconstitutionality and manifest injustice). *But see* Note, 30 YALE L.J. 762 (1921). Without knowledge that one does possess a thing it is difficult to see how there is an act. *See* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 8-10 (2d ed. 1961) [hereinafter cited as WILLIAMS]. The requirement that possession must be knowing before an accused can be found guilty of possession of drugs was recognized in Louisiana in *State v. Johnson*, 228 La. 317, 327, 334, 82 So. 2d 24, 27, 30 (1955) (on rehearing).

11. Required as an essential ingredient of the crimes of possession of narcotic drugs and drug paraphernalia in Louisiana. *See* State v. Kreller, 255 La. 982, 233 So. 2d 906 (1970) (state's evidence regarding narcotics transaction not charged held proper to show guilty knowledge, an essential ingredient in crimes of possession or selling narcotics); State v. Birdsell, 232 La. 725, 95 So. 2d 290 (1957) (prosecution for unlawful possession of hypodermic syringe and needle; state's evidence that barbiturate also found in box containing syringe and needle proper to prove "real intent" with which these articles were possessed).

12. State v. Cann, 319 So. 2d 396, 399 (La. 1975).

13. *Id.* at 397-98, quoted in State v. Alford, 323 So. 2d 788, 790 (La. 1975).

complete accord, but it will take more than the lucubrations of the present opinion to convince him that the court is being candid when it says, "Our own jurisprudence guides us in this determination."<sup>14</sup> On the contrary, the visitor cases decided last term represent a distinct departure from prior Louisiana jurisprudence.

Formerly, all persons found on premises where narcotics were located were exposed to conviction and punishment for their possession. Thus, in *State v. Williams*,<sup>15</sup> the fact that the co-defendant was merely visiting the apartment at the time of the crime did not merit serious discussion by the court. Police observed her through a screen door seated on a bed with two other men, one of them a "drug-addict," watching television, and when they knocked on the door and announced their authority, she was seen entering the kitchen for a few seconds. A heroin capsule was found under the refrigerator in the kitchen, marijuana was found beneath a cedarrobe in the living room and a "narcotics outfit" was found hidden beneath a board near the door of the apartment. "Whether or not these and other items introduced were in the possession or under the control of some or all of the defendants was a question of fact for the jury,"<sup>16</sup> and defendant's conviction would not be disturbed on appeal. In *State v. Smith*,<sup>17</sup> the defendant husband properly could be found guilty of constructive and joint possession of heroin over which his wife had actual physical possession where the state's case was that the wife purchased the drug out of his presence then met him in a bar whence they drove off together in his car, and after the vehicle was parked and husband and wife were placed under arrest, the wife threw the narcotics to the ground. The husband's spontaneous admission that the police had arrested him too soon and had no case, since he was still waiting on a personal shipment of drugs, proved guilty knowledge by him of the instant transaction which was deemed sufficient to support the inference that his wife possessed the drugs for their joint benefit. The court also seemed to approve the prosecutor's closing argument that "since the wife admitted she was shooting twelve papers of heroin a day into her veins, her husband should have known she was an addict."<sup>18</sup>

Perhaps the court maintained a formal tie with the prior jurisprudence because of the wisdom of the rule of *stare decisis*. In any event, the turnabout in drug possession cases is hardly an example of judicial oppor-

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14. *Id.* at 398.

15. 250 La. 64, 193 So. 2d 787 (1967).

16. *Id.* at 75, 193 So. 2d at 790.

17. 257 La. 1109, 245 So. 2d 327 (1971).

18. *Id.* at 1122, 245 So. 2d at 332.

tunism: the court is on solid ground when it reads the case law in this country to hold that a person cannot be said to be in possession merely because he was in the premises when the police seized drugs.<sup>19</sup> An excellent treatise on the subject of narcotics prosecutions states the matter this way:

Unless there is some additional evidence specifically linking the accused to the narcotics, or it is established that the premises were under the control of the accused, the evidence is insufficient to establish constructive possession as a matter of law.<sup>20</sup>

Although resolution by an appellate tribunal of the issue whether the state failed to prove constructive possession, or whether the trial judge erred in sending the case to the jury, depends greatly upon the legal criteria governing judges' authority to delimit a zone within which the jury may act<sup>21</sup> (the written dissenter's bone of contention in one of the visitor cases<sup>22</sup>), the above principle probably must be adhered to as a matter of federal constitutional law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>23</sup> The United States Supreme Court struck down under the due process clause a statutory inference, contained in an Act of Congress, authorizing the jury to convict for possession of an unregistered still an accused who was "shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without

19. See, e.g., *Haley v. State*, 7 Md. App. 18, 253 A.2d 424 (1969); *Riggs v. State*, 486 P.2d 643 (Okla. App. 1971).

20. D. BERNHEIM, DEFENSE OF NARCOTIC CASES 1-75 to 1-76 (1975) [hereinafter cited as BERNHEIM].

21. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152-63 (1960).

Professor Goldstein states that "[a]lmost from the time judges began to determine sufficiency of the evidence in criminal cases . . . they have included the standard of ultimate persuasion as part of their criterion of sufficiency," *id.* at 1157; he intimates that such a standard is necessary if the requirement of proof beyond a reasonable doubt is not to be confined "to the role of an admonition to the jury regarding the assurance it should have before finding a man guilty." *Id.* at 1159.

Professor McCormick states that the reasonable doubt test of legal sufficiency of the evidence to take the case to the jury is now the one most used by the United States Courts of Appeals, and one that may be constitutionally required. See C. MCCORMICK, EVIDENCE § 346 at 832 & nn. 6 & 7 (Cleary ed. 1972) [hereinafter cited as MCCORMICK], citing Fed. R. Evid. 303, Adv. Comm. Note; *id.* § 338 at 790 & nn. 33 & 34, quoting from *United States v. Vuitch*, 402 U.S. 62, 72 n.7 (1971), wherein the Court stated in dictum, "a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt."

22. See *State v. Alford*, 323 So. 2d 788, 791-93 (La. 1975) (Summers, J., dissenting).

23. U.S. CONST. art. VI.

having been registered," holding, mere presence at the still is "too tenuous to permit a reasonable inference of guilt. . . ." <sup>24</sup> Sometimes, then, the question "Did the prosecution offer 'enough' evidence to enable the jury to act rationally?" <sup>25</sup> must be decided by judges sworn to uphold the Constitution—whether the question of sufficiency of evidence is labeled, as it usually is, <sup>26</sup> a decision on a matter of law or, as it sometimes is in Louisiana, a decision on a matter of fact. <sup>27</sup>

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24. *United States v. Romano*, 382 U.S. 136, 141 (1965).

25. *See Goldstein, supra* note 21, at 1155.

26. *See State v. Douglas*, 278 So. 2d 485, 490 (La. 1973); *Goldstein, supra* note 21, at 1155.

27. *Compare State v. Hudson*, 253 La. 992, 1033-36, 221 So. 2d 484, 498-500 (1969) (provisions of the Constitution of 1921, guaranteeing that the jury in criminal cases shall be judges of the facts on the question of guilt or innocence and limiting the supreme court's criminal appellate jurisdiction to questions of law, prevent judges, trial or appellate, from determining the sufficiency of evidence to sustain a verdict of guilty) with *State v. Douglas*, 278 So. 2d 485, 489-91 (1973) (directed verdict article authorizing trial judge in criminal case to withhold case from jury if evidence insufficient to sustain a conviction does not conflict with provision of Constitution of 1921 confiding fact-finding power to determine guilt or innocence in the jury since determination of legal sufficiency of evidence is for the "trier of law"; total lack of evidence to prove a crime or essential element thereof is a question of law which may be reviewed by the supreme court). The last-mentioned case, noted approvingly in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Postconviction Procedure*, 35 LA. L. REV. 512, 515-16 (1975), while undoubtedly a step in the right direction, see authorities cited note 21, *supra*, is unusual in setting up different standards for the trial judge in passing upon the motion for directed verdict and the appellate court in deciding whether the trial judge erred in sending the case to the jury. *See Goldstein, supra* note 21, at 1155. The words "law" and "fact" should not be given these accoridian-like qualities when the issue is the same: "Did the prosecutor offer 'enough' evidence to enable the jury to act rationally?" *See id.*; accord LA. CODE CRIM. P. art. 778, comment (a), as amended by La. Acts 1975, No. 527, § 1. Appellate courts should be as astute to set aside an erroneous conviction when there is not evidence from which a jury could have found a person guilty beyond a reasonable doubt as trial judges. *See MCCORMICK* § 346 at 832.

Recent apparent efforts by the legislature to stymie trial court judges in criminal cases tried to a jury by taking away their former power to withhold a case from the jury for insufficient evidence, *see* La. Acts 1975, No. 527, § 1, amending LA. CODE CRIM. P. art. 778, overlook the fact of the trial judge's authority, of long standing in Louisiana, to grant a new trial "if he feels the jury was wrong in convicting the defendant." *See* LA. CODE CRIM. P. art. 851(1), comment (d); Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11, 30 (1953) ("Ample protection from a prosecution-happy jury is provided by the motion for a new trial on the ground that the verdict is contrary to the law and the evidence."). The supreme court has for years held it is the duty of the trial judge to determine the sufficiency of the evidence to support the jury's verdict of guilty. *See State v. Daspit*, 167 La. 53, 118 So. 690 (1928); accord *State v. Jones*, 288 So. 2d 48 (La. 1973), noted with

The first ground of the court's decisions in the visitor cases, that presence cannot equal possession, is therefore unassailable. The second strand of the principle it distills from the jurisprudence, that a person cannot be convicted of possession of drugs because he is in the company of an individual found to be in actual physical possession of drugs,<sup>28</sup> and that additional evidence that he had or shared dominion or control of the drugs is required for the case to survive a motion for directed verdict, is also implicit in the requirement of due process of law. While it may have once been the case that "birds of a feather flock together," the inference of guilt by association is now so strained as "not to have a reasonable relation to the circumstances of life as we know them."<sup>29</sup>

Much of the present controversy in constructive possession cases revolves around the issue of what "additional evidence" is legally sufficient to sustain a conviction, and more particularly, whether evidence of knowledge of the location of narcotic drugs should properly be considered as going to prove the distinct element of constructive possession. Where defendant is not shown to be in control of premises where drugs are found, a matter to be taken up presently, such additional evidence usually falls into one of three categories. First, the accused may admit ownership, as often occurs when the drugs are found in the home of the accused's sweetheart or spouse.<sup>30</sup> Second, some physical evidence may link the accused to the drugs; for example, where police entered an apartment and found the defendant and three other persons engaged in a poker game, evidence that an envelope addressed to the defendant at the address searched was found in the same cardboard box as the contraband established his constructive possession of the drugs.<sup>31</sup> Third, some incriminating conduct of the accused's may

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*approval in 35 LA. L. REV.* 512, 516-17 (1976). The solons would do well to ponder the thought that although the jury is properly deemed the "repository of the standard of justice in the community," see *State v. Hudson*, 253 La. 992, 1035, 221 So. 2d 484, 499 (1969), it does not follow that it is infallible.

28. See, e.g., *State v. Hunt*, 91 Ariz. 149, 370 P.2d 642 (1962).

29. See *Tot v. United States*, 319 U.S. 463, 467 (1943) (provision of Federal Firearms Act, which makes it criminal for a person previously convicted of a violent crime to receive any firearm which has been shipped in interstate commerce, stating that possession of a firearm by such a person shall be presumptive evidence of its transfer in interstate commerce, held irrational and therefore violative of due process of law).

30. See, e.g., *People v. Matthews*, 18 Ill.2d 164, 163 N.E.2d 469 (1960) (defendant, convicted of illegal possession of narcotic drugs, told police that locked suitcase found in his paramour's apartment which contained drugs belonged to him).

31. See *Haynes v. State*, 475 S.W.2d 739 (Crim. App. Tex. 1972). For an intriguing bootlegging case wherein the probative links establishing possession and guilty knowledge read like a Sherlock Holmes adventure, see *United States v. Sawyer*, 294 F.2d 24 (4th Cir. 1961).



suggest at least shared dominion and control of the drugs.<sup>32</sup> That the evidentiary significance of knowledge is apt to be crucial in the last kind of case, where there is neither a confession nor physical evidence linking accused to the drugs, is seen in the following two precedents.

In the first case, *Blaylock v. State*,<sup>33</sup> the court found the following facts: police officers observed defendant through a window standing beside a man, Engel, who was seated on a bed giving himself an injection of "some sort of fluid." As the officers made forced entry, the occupants ran for the rear of the apartment, with defendant following Engel into a bathroom and closing the door. The officers forced their way into the bathroom in time to see Engel flushing the commode in which there remained a piece of bloody rag. Defendant testified that an overnight bag found in the apartment was hers, but disclaimed ownership of a hypodermic syringe containing a tiny amount of morphine solution which was in the bag, and denied living in the apartment. The appeals court—properly, in this writer's view—affirmed defendant's conviction for constructive joint possession of a bottle of morphine found in a kitchen cabinet of the apartment.

In the second case, *People v. Robinson*,<sup>34</sup> the facts were: police officers taxed an informer to an apartment where he purchased narcotics from a man known to him as "Preacher" with marked money which he handed to a man named Saffold. They then knocked at the door of the apartment and were admitted by Saffold who hollered "Police!" En route to the bathroom of the apartment one of the officers was able to see a checkerboard on top of the commode, and on top of the checkerboard two tin foil packets and some loose powder. Defendant and another man, Carruthers, were in the bathroom at this time. One of them hit the checkerboard and the powder fell into a bathtub which was full of water; the two tin foil packets, which contained heroin, fell to the floor. Defendant's conviction for joint possession of the heroin was reversed because "the officers did not at any time see [him] touch the narcotics,"<sup>35</sup> since it was not clear whether defendant or Carruthers hit the checkerboard, and "mere knowledge of the location of narcotics is not the equivalent of possession but

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32. See, e.g., *Smith v. United States*, 385 F.2d 34 (5th Cir. 1967) (constructive possession by defendant of heroin in actual possession of co-defendant established by post-Mexican border crossing maneuvers involving rendezvous with co-defendant in motel followed by convoy trip across state and subsequent transport of co-defendant in defendant's truck just prior to arrest and seizure of narcotics); *Garza v. United States*, 385 F.2d 899 (5th Cir. 1967) (similar facts).

33. 171 Tex. Crim. 665, 352 S.W.2d 727 (1961).

34. 102 Ill. App.2d 171, 243 N.E.2d 594 (1968).

35. *Id.* at 174, 243 N.E.2d at 595.

merely a necessary element of criminal possession."<sup>36</sup>

With all due respect, the *Robinson* court, although it is not alone in holding that doubt whodunit in joint constructive possession cases precludes conviction of anyone,<sup>37</sup> is unreasonable in restricting the evidentiary significance of knowledge to the scienter element of the crime. The court's doctrinaire approach calls to mind the discredited *res ipsa loquitur* or "equivocality" test for criminal attempt, according to which the defendant is innocent unless his overt act shows criminal intent on the face of it.<sup>38</sup> The problem is that no one could be found guilty under such a test since every act is equivocal.<sup>39</sup> Of course, the court will, in the future, have to determine whether a defendant's conduct is too equivocal in nature to bottom a conviction for constructive possession. Hopefully, it will not shut its eyes to some of the evidentiary facts bearing on this question, including the defendant's knowledge that narcotics were present on the premises.

Coming now to the heart of this discussion, it is time to consider the peculiar "presumption"<sup>40</sup>—anomalous in light of the special solicitude which courts, of late, have shown for "visitors" lest one be punished for the

36. *Id.* at 175, 243 N.E.2d at 596.

37. See *Delgado v. United States*, 327 F.2d 641 (9th Cir. 1964) (reversing defendants' conviction for receiving and concealing marijuana found in nightstand at the foot of their bed because of doubt whether only one or both of them had possession); *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957) (reversing conviction for possession of marijuana found under front seat of defendant's car since drugs could have been placed there by passenger or by any person while unlocked car was left unattended); cf. *People v. Foster*, 253 P.2d 50 (Cal. App. 1953) (reversing conviction of right side front seat passenger for joint possession of heroin thrown out right front window of car; affirming conviction of middle front seat passenger because his "clumsy attempt to manufacture a defense" might reasonably weigh against him in the minds of the jury); *Crisman v. Commonwealth*, 197 Va. 17, 87 S.E.2d 796 (1955) (reversing hitchhiker passengers' conviction for possession of heroin found on floor in rear of auto where they were seated because men in front seat or some unknown party could have placed it there).

38. See *King v. Barker*, 1924 [1924] N.Z.L.R. 865 (N. Z. Ct. App.), criticized in WILLIAMS at 630-31; Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505, 506-08.

39. See authorities cited note 38, *supra*.

40. The term is used in the text, as it is in the criminal cases, to describe what is really a "standardized inference" or rule of law which holds that proof of fact A is sufficient evidence to warrant, but not require, the existence of fact B. Proof of fact A (control of premises where drugs are found) is sufficient evidence of the presumed fact B (possession of the drugs) to take the state's case to the jury; "[t]he jury is permitted but not required to accept the existence of the presumed fact even in the absence of contrary evidence." See MCCORMICK § 342 at 803-04. See generally Ashford and Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969).

friends he keeps—that proof, without more, that the defendant exercises exclusive control<sup>41</sup> of “private”<sup>42</sup> premises where drugs are found warrants his conviction. The Supreme Court of Illinois put the reason for the presumption this way:

The underlying principle of the . . . cases is that where narcotics are found on premises under defendant's control, it may be inferred that the defendant had both knowledge and control of the narcotics. This inference is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted. By law the use of narcotics, except for specified medicinal purposes, is rigidly condemned. Because of this illegitimate nature of narcotics, they are sold for exorbitant sums on the black market and are therefore of great value to the person possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the

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41. Courts sometimes hold that nonexclusive control of premises where drugs are found will not support an inference of possession. *See, e.g., Evans v. United States*, 257 F.2d 121, 128 (9th Cir. 1958) (since evidence only proved defendant lived part of the time at paramour's apartment inference of possession of marijuana concealed under rug not proper; but defendant's statement to police, “Well, you don't want to book her for that,” justified his conviction as the only other person who could have placed drugs where they were found). In husband and wife situations the onus of the presumption may fall on the husband. *See, e.g., Arellanes v. United States*, 302 F.2d 603 (9th Cir. 1962) (where husband and wife pulled up in front of their flat in a car loaded down with drugs, husband's conviction affirmed because he had “control and direction of the auto”; wife's conviction reversed because her presence “is as fully explained by her attachment to her husband as it might be by a control over the drugs”).

Proof of control of premises does not depend upon proof of ownership or payment of rent but may be shown by circumstantial proof that defendant resides on the premises or drives the car and has the keys in his possession. *See Williams v. United States*, 418 F.2d 159 (9th Cir. 1969) (no proof who owned or rented house but presumption applicable to defendant who was clad in a bathrobe, sitting on a sofa, eating and watching television when police arrived since “he was obviously at home”; co-defendant woman, who answered door fully dressed, had her conviction reversed since there was no proof she lived in house or that female apparel in bedroom was hers); *State v. Potts*, 1 Wash. App. 61 464 P.2d 742, 745 (1969) (defendant, who had keys to car, and was driving it, and was its sole occupant was in dominion and control thereof and, therefore, properly convicted for constructive possession of marijuana plant found in car trunk; state need not prove ownership of car). *See generally* BERNHEIM at 1-180-83, 1-191.

42. Where drugs are found in public places, though in close proximity to defendant, there is no presumption. *See Carroll v. State*, 90 Ariz. 411, 368 P.2d 649 (1962) (evidence insufficient to sustain conviction for possession of heroin by defendant who was seen by officer to make a backward motion with his hand and jump off bench behind which officers subsequently found a rubber sheath containing heroin).

narcotics traffic is conducted with the utmost secrecy and care. Human experience teaches that narcotics are rarely, if ever, found unaccountably in a person's living quarters.<sup>43</sup>

Cursory reading of the quotation suggests practically every reason claimed in support of the presumption lacks cogency in regard to marijuana. Possession of the drug is not "rigidly condemned" as it once was by the lawmaker;<sup>44</sup> marijuana is not sold for "exorbitant sums"—as any college student knows—and it is accordingly not of "great value" to its possessor; the "traffic" is not conducted with "utmost secrecy and care."<sup>45</sup> Therefore, marijuana might well be found "unaccountably" in a person's living quarters, if by that term is meant, as it must if the rule is to make any sense as a basis for liability, without personal culpability of the homeowner.

As a preliminary matter, it is appropriate to point out that discriminating application of the presumption of possession arising from control of premises works no injustice. Examination of the law reports reveals that it is not inflexibly invoked to uphold convictions where this would very likely produce a clear miscarriage of justice. Special circumstances which strongly indicate sole responsibility by a party other than the one who controls premises wherein the drugs are found can overcome the presumption in the minds of appellate judges and result in overturning of a conviction.<sup>46</sup>

43. *People v. Nettles*, 23 Ill.2d 306, 178 N.E.2d 361, 363 (1961).

44. In Louisiana first conviction for possession of marijuana carries a penalty of five hundred dollars and/or imprisonment in the parish jail for not more than six months. *See* LA. R.S. 40:966D (Supp. 1973). Formerly, conviction for possession of marijuana carried a mandatory minimum punishment of imprisonment at hard labor for not less than ten years. *See* La. Acts 1951, No. 30, § 1; *State v. Johnson*, 228 La. 317, 327, 82 So. 2d 24, 27 (1955).

45. *See* J. SIMMONS, *MARIJUANA: MYTHS AND REALITIES* 236 (1967); J. ROSEVEAR, *POT: A HANDBOOK OF MARIJUANA* 121-25 (1967), *cited in* *Leary v. United States*, 395 U.S. 6, 47-48 & n.95 (1969), for the point advanced in the text.

46. *See* *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968) (defendant, automobile driver, had his smuggling conviction reversed where co-defendant passenger had heroin concealed on his person and told customs officials at the time of his arrest that driver knew nothing about it); *Medina v. State*, 164 Tex. Crim. 16, 296 S.W. 2d 273 (1956) (defendant, in whose apartment marijuana was seized in plain view on her dresser, had conviction reversed where evidence showed she invited police to search apartment, and boyfriend, who had key to apartment and prior drug conviction, arrived during search and told police marijuana was his). *Cf.* *People v. Galloway*, 28 Ill.2d 355, 192 N.E.2d 370 (1963) (wife not charged where heroin found with defendant husband's papers in dresser drawer, and husband, clad in his underwear, told police he only came by "wife's" apartment, previously used by him as his address, to visit his kids, take a bath, and count his money, allegedly kept there because he didn't trust banks); *People v. Matthews*, 18 Ill.2d 164, 163 N.E.2d 469 (1959) (woman, in whose apartment police seized locked suitcase containing narcot-

However, rescue in this type of case, even by one who proclaims sole responsibility, is doubtful because the "path of heroism" may also be the door to collusion.<sup>47</sup> The presumption is also sometimes employed as a make-weight in that there is additional persuasive evidence that the controller of premises is indeed the guilty principal.<sup>48</sup> Obviously, no unfairness results from its use in such cases. If this were all, the law of constructive possession would be in a very satisfactory state.

Unfortunately, however, the prosecution sometimes has little more to hang a conviction on than the presumption.<sup>49</sup> Such stark limitation of the issue, in the case of an artificial presumption, can take away the right of trial by jury by controlling the effect of evidence on the minds of the jury.<sup>50</sup> Furthermore, as the following case shows,<sup>51</sup> use of the presumption, though

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ics and legal papers belonging to defendant boyfriend, not charged where he told police, "[she] doesn't know anything about this dope at all").

47. *Cf.* *People v. Embry*, 20 Ill.2d 331, 169 N.E.2d 767 (1960) (testimony by two witnesses that defendant's wife, wanted on a fugitive warrant for narcotics violations, fixed up packages of narcotics before he arrived at apartment, and defendant's testimony that he quit apartment after quarrel with wife over her drug habit and was there at the time of the raid to pick up some clothing and talk with her, deemed insufficient to merit reversal, the court noting that joint possession established by proof defendant paid the rent and was present when drugs were seized).

48. *See, e.g.,* *People v. Nettles*, 23 Ill.2d 306, 178 N.E.2d 361 (1961) (asked if paper bag seized behind entrance door of defendant's apartment, occupied by others, belonged to him, defendant said, "anything you find in the apartment is mine"); *People v. Mack*, 12 Ill.2d 151, 145 N.E.2d 609 (1957) (possession by defendant of rent receipt for apartment found to contain large cache of opium triggered presumption, but inference buttressed by fact of defendant's entry and surreptitious departure via rear fire escape just before narcotics seized).

49. The majority in *State v. Mims*, 330 So. 2d 905 (La. 1976), gave some weight to defendant's "confession," which it said the trier of fact could construe as being "partially inculpatory." *Id.* at 910. The defendant, a high school student, wrote the following at the stationhouse: "I, Tye P. Mims this day . . . confess to the possession of seed relating marijuana and paraphernalia arrested by Trooper James W. Farris and John Blunschi. The articles found in my car were not owned by or smoked by any member in the vehicle including myself they were left by someone other than the people involved not knowing rightfully who to say it was[.]" *Id.* at 910 n.5. The statement, in this writer's view, constitutes merely an acknowledgment by the boy that the evidence was in fact found in his car by the troopers and therefore was technically in his possession. He says he does not know how it got there and if this is taken at face value he has not confessed to a crime. *See* cases cited note 10, *supra*.

50. *See* *People v. Lyon*, 27 Hun. 180 (Sup. Ct. N.Y. 1882) (criminal statutory presumption making the act of drinking in a place, licensed for sale but not for drinking, *prima facie* evidence of sale with intent liquor should be drunk there, held unconstitutional deprivation of accused's right to trial by jury).

51. *See* *People v. Valot*, 33 Mich. App. 49, 189 N.W.2d 873 (1971); *accord*,

attractive as a shortcut for law enforcement, may facilitate selective prosecution and conviction of one individual—who happens to pay the rent or motel bill on lodging or to control the automobile where marijuana is found—“without differentiable proof”<sup>52</sup> that others are less culpable.

Defendant, in whose name a motel room was registered, was prosecuted and convicted of having control of marijuana found in the room.<sup>53</sup> Responding to a call from a motel employee, police learned from the motel manager that he was concerned about the continued use of one of the rooms by a number of “hippie-type people.” Motel employees’ efforts to contact the room by telephone were unsuccessful, and the manager opened the door with a passkey. The manager and the policemen walked in and observed five people sleeping—defendant and his girlfriend on one of the beds; a couple sprawled out on the floor; and another man on the other bed. Marijuana cigarettes were found in plain view on a desk in the motel room. A brass water pipe, later established to contain traces of marijuana, was found on a table next to the bed where defendant and his girlfriend were sleeping, and a marijuana cigarette butt was found beside their bed. On the floor near the bed where the other man was sleeping was another marijuana cigarette butt. Only the defendant was charged with possession and control of the marijuana found in the motel room; at his trial, the state offered no evidence that he, rather than others present in the room, had brought the marijuana into the room or had used it, contenting itself to prove that the motel room was registered in defendant’s name. Only one judge dissented from the affirmation—based upon the presumption—of defendant’s conviction. His words are worthy of quotation:

The rented motelroom bore the earmarks of a crash pad. The ebb and flow of humanity in and out of the room indicates a somewhat unconventional living style. Conventional notions as to control and possession are simply inapplicable to crash-pad communal life. I think

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*Bettis v. United States*, 408 F.2d 563, 566 (9th Cir. 1969) (smuggling marijuana; automobile driver’s conviction affirmed based on presumption arising from dominion of car, passenger’s conviction reversed); *People v. Davis*, 33 Ill.2d 134, 210 N.E.2d 530 (1965) (fact that heroin packets found in defendant’s car, in places where he could or should have been aware of them, is sufficient evidence of knowledge and control to sustain conviction); *People v. Embry*, 20 Ill.2d 331, 169 N.E.2d 767 (1960); *cf. United States v. Bethea*, 442 F.2d 790 (D.C. Cir. 1971) (reversing front-seat passenger’s conviction for concealment of heroin found behind rear seat of car next to gun which officer saw in hands of rear-seat passenger; driver and rear-seat passenger convicted).

52. See *People v. Valot*, 33 Mich. App. 49, 189 N.W.2d 873, 899 (1971) (Levin, J., dissenting).

53. *Id.*, 189 N.W.2d at 873.

we should know a great deal more about such societal patterns than we do before we declare our satisfaction that it is reasonable to infer that whoever happens to have paid the rent for a motel room occupied by a number of persons is in control or possession of marijuana or other property belonging to the persons moving in and out of the room.<sup>54</sup>

Whether one holds the strict view that the reasonable doubt standard should be used to test the constitutional validity of a criminal presumption if proof of the crime charged or an essential element thereof depends upon its use,<sup>55</sup> or employs the standard, recently approved by the United States Supreme Court in cases involving constitutional attacks upon statutory presumptions,<sup>56</sup> which judges a criminal presumption as "arbitrary," and hence unconstitutional, "unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend,"<sup>57</sup> it is submitted that the

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54. *Id.* 189 N.W.2d at 878 (Levin, J., dissenting). The Court of Appeals of Michigan appears to have embraced Judge Levin's views the following year. *See People v. Davenport*, 39 Mich. App. 40, 197 N.W.2d 521 (1972) (reversing defendant's conviction for possession of heroin seized in basement of house occupied by several other persons, some of whom were not charged).

55. *See* Prop. Fed. R. Evid. 303(b) & Advisory Committee's Note, 56 F.R.D. 183, 212 (1972). The Supreme Court found it unnecessary to reach the question whether a criminal presumption must satisfy this standard in recent constitutional attacks upon criminal statutory presumptions. *See Turner v. United States*, 396 U.S. 398, 416 (1970); *Leary v. United States*, 395 U.S. 6, 36 n.64 (1969). However, one of the points decided in the former case, *viz.*, possession of cocaine in a package without appropriate tax stamps cannot be made presumptive of the fact the possessor purchased same "not in or from" the original stamped package, indicates the Court may have been using "the more exacting reasonable-doubt standard normally applicable in criminal cases." 396 U.S. at 416, 422-24 (1970). The Court recently utilized the reasonable doubt standard in approving the common-law presumption of guilty knowledge from the fact of unexplained possession of recently stolen goods. *See Barnes v. United States*, 412 U.S. 837, 846 (1973); *accord*, *State v. Curry*, 319 So. 2d 917 (La. 1975). Additional support for its use may be found in the case of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), holding unconstitutional a requirement that an accused negate malice aforethought for murder, presumed from the fact of an intentional killing, by proving by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, and requiring instead that the prosecution prove beyond a reasonable doubt the absence of such mitigation when the issue is properly presented in a homicide case.

56. *See Turner v. United States*, 396 U.S. 398 (1970) (possession of narcotic drugs, presumptive of illegal importation and knowledge thereof, rejected in regard to cocaine, sustained in regard to heroin; possession of narcotic drugs without tax stamps, presumptive of purchase, etc. "not in or from" original stamped package, rejected in regard to cocaine, sustained in regard to heroin); *Leary v. United States*, 395 U.S. 6 (1969).

57. *See Leary v. United States*, 395 U.S. 6, 36 (1969) (emphasis added).

judge-made presumption which is now under consideration is an appropriate candidate for critical reassessment by the judiciary.<sup>58</sup> The late Mr. Justice Black's enmity toward all criminal presumptions against the person charged with crime,<sup>59</sup> which he dubbed "presumptions of guilt,"<sup>60</sup> does not detract from the truth of his observation that the framers of our Constitution and Bill of Rights did not leave "judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants."<sup>61</sup> It makes no difference whether legislatures or courts clothe prosecution evidence in "presumptions" or "inferences" which are irrational or arbitrary.<sup>62</sup> Moreover, the validity of a criminal presumption cannot be tested by the need for effective law enforcement or the comparative convenience of producing evidence of the ultimate fact: "[t]he argument from convenience is admissible only where the inference is a permissible one. . . ."<sup>63</sup> because ours is an accusatorial—not an inquisitorial—system.<sup>64</sup>

The dissenter's reference to sociological facts of "crash-pad communal life" in the above-quoted case is not misshapen. The Constitution commands that judges review the creation and continued use of presumptions. Thus, in passing upon a criminal statutory presumption, contained in a federal anti-narcotic law, which made the bare fact of possession of marijuana presumptive of knowledge by its possessor of its illegal importation into the United States, the Court undertook an extensive review of recent published information regarding marijuana use in the United States, "to ascertain whether the intervening years [since the presumption was enacted] have witnessed significant changes which might bear upon the presumption's validity."<sup>65</sup> Despite its conclusion that most domestically consumed marijuana comes from abroad,<sup>66</sup> the Court struck down the

58. For a useful list of cases involving attacks made on criminal statutory presumptions, see Note, 2 ST. MARY'S L.J. 115, 117-19 & nn.13-28 (1970).

59. See *Turner v. United States*, 396 U.S. 398, 425-34 (1970) (Black, J., dissenting).

60. *Id.* at 433.

61. *Id.* at 426.

62. See *Barnes v. United States*, 412 U.S. 837, 844-45 & n.8 (1973); *McCORMICK* § 344 at 811. Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law; if a state legislature is barred from passing such a law, the due process clause forbids a state supreme court from achieving the same result by judicial construction).

63. See *Tot v. United States*, 319 U.S. 463, 469 (1967); *accord*, *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969).

64. See *Turner v. United States*, 396 U.S. 398, 407 n.8 (1970).

65. See *Leary v. United States*, 395 U.S. 6, 38 (1969).

66. *Id.* at 44.



"knowledge of illegal importation" presumption, and was aided in reaching its conclusion—that a majority of marijuana possessors could not be rationally presumed to know their marijuana was illegally imported<sup>67</sup>—by the fact that recent studies put the ratio of "occasional" to "regular" marijuana smokers as high as ten to one, and the common sense judgment that occasional users would be less informed and less particular about the drug they smoke.<sup>68</sup>

Given our present knowledge regarding the prevalence of marijuana smoking and the ready availability of the drug, is it more likely than not that a person in whose house or car marijuana is found in plain view, when one or more other persons are present, has exclusive dominion and control of the marijuana? Does "human experience" still teach that marijuana is "rarely, if ever, found . . . in a person's living quarters" without his being the party in possession of the drug? If the answer is "no," the law must not rely upon the presumption as a one-way street to selective conviction in constructive possession cases. Either all persons who are present with their eyes open to the facts should be convicted or none of them should be. If judges are unwilling to curtail association by letting juries decide whether or not to punish visitors,<sup>69</sup> it smacks of hypocrisy to unduly weigh the scales against hosts whose only crime may be the indulgence of others who are their social guests. Since it is already a crime, punishable by up to fifteen thousand dollars fine, to keep a room or a car which is frequented by marijuana smokers for the purpose of using the drug,<sup>70</sup> and conviction thereunder does not require proof of guilty knowledge,<sup>71</sup> prosecutors have available a ready

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67. *Id.* at 46-47.

68. *Id.* at 47-48 & nn.94 & 96.

69. Facts brought out in *Cann*, (cited note 2, *supra*) that defendant had a prior drug felony conviction, that his "date" invited one Miss Goodjoint to the apartment and that police found a marijuana cigarette in the latter's hat at the time of the raid, (see *CANN TRANSCRIPT*, *supra* note 2, at 50, 62, 67-68) were apparently deemed immaterial by the court, despite the attorney general's contrary assertion that any error by the trial court in failing to grant a directed verdict was rendered harmless when "[t]he defense . . . proceeded to parade before the Court a series of witnesses . . . [who] convinced the Court of defendant's guilt beyond a reasonable doubt." See Brief for appellee at 4-5, Doc. No. 56266 (filed August 27, 1975, Supreme Court of Louisiana). *Contra, e.g.*, *State v. Thompson*, 220 S.C. 523, 526 (1951) ("We know of no reason why the defendant in a criminal court, who is not content to leave the commonwealth's case where he finds it, should escape a just conviction simply because he has, unfortunately for himself, completed the proof of his own guilt.").

70. See LA. R.S. 40:971A (1) (f) (2) (Supp. 1975).

71. *Id.* If the violation is committed knowingly, defendant may be imprisoned for not more than six months and fined up to five hundred dollars.

tool for stamping out libertinism in the home or car, if this be desired.<sup>72</sup> Significantly, conviction under such a statute is not based upon any artificial presumption of possession and the seeds of disrespect for law are not planted by the judiciary.

#### KILLING OF A FETUS NOT MURDER

A prosecution for murder requires proof of the "killing of a human being" and therefore could not lie against a man who hit a pregnant woman with a stick thereby causing her male "child" to be stillborn.<sup>73</sup> A judicial declaration that a fetus cannot be murdered since it is not a "human being" may seem shocking to most non-legal observers, including medical doctors, since they are accustomed to thinking of life in different terms.<sup>74</sup> It may also seem puzzling to the personal injury lawyer familiar with the jurisprudence allowing tort recovery for pre-natal injury to or wrongful "death" of an unborn child,<sup>75</sup> and to the novice in criminal law who learns that to intentionally kill a man already at death's door is nonetheless murder.<sup>76</sup> Why should the criminal law protect the life of a condemned man awaiting sentence of execution<sup>77</sup> and not that of an infant on the threshold of life? The justices, steadfast to the principle *nullum crimen sine lege*,<sup>78</sup> answer that we cannot supply the 'ought' of the criminal law, only the 'is' and the 'now.'<sup>79</sup> The analogy principle, common in totalitarian governments,<sup>80</sup> is so danger-

72. Persons who resort to such premises for the purpose of smoking marijuana can be jointly convicted as principals. See LA. R.S. 14:24 (1950). If proof of the former is considered too difficult, the legislature can make knowing presence in a room or car where marijuana is kept a crime. See, for example, Law of March 15, 1960, Ch. 204, § 2, [1960] Mass. Laws 112 (*repealed* 1971), *quoted in* People v. Valot, 33 Mich. App. 49, 189 N.W.2d 873, 879 n.9 (1971) (Levin, J., dissenting).

73. State v. Gyles, 313 So. 2d 799 (La. 1975).

74. See Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines*, 52 MARQ. L. REV. 105 (1968).

75. See Cooper v. Blanck, 39 So. 2d 352 (La. App. Orl. Cir. 1923) (prenatal injury of a fetus which results in death of the child three days after its birth gives right of action to the child which survives to its parents and to the parents for wrongful death of the child); W. PROSSER, LAW OF TORTS 335 *et seq.* (4th ed. 1971).

76. See State v. Matthews, 38 La. Ann. 795, 796-97 (1886).

77. See Perkins, *The Law of Homicide*, 36 J. CR. L. & CR. 391, 409 (1946).

78. WILLIAMS at 575 ("the principle of legality").

79. A brilliant tour de force from the realm of science fiction brings home the principle of legality in criminal law. See I. ASIMOV, *A Loint of Paw*, reprinted in A. BOUCHER, THE BEST FROM FANTASY AND SCIENCE FICTION - SEVENTH SERIES 182-83 (Doubleday & Co., Inc. 1958).

80. See, e.g., Nazi Law of June 28, 1935, *quoted in* J. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 38 (2d ed. 1969): "Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the

ous in the field of crimes<sup>81</sup> that the Louisiana Criminal Code has outlawed it in express words,<sup>82</sup> and the court should be applauded for insisting that the crime of murder could not be stretched by judges beyond the settled meaning of the words of the statute as written.

By defining the legal state of life as beginning from "the moment of fertilization and implantation,"<sup>83</sup> the legislature has paved the way for a successful murder prosecution on the facts stated in *Gyles*. The California legislature did the same thing after the state's highest court held that the common law meaning of the words "human being" in its existing murder statute was a person born alive, and, therefore, that an information charging a defendant with willful murder in the intentional killing of an unborn but viable fetus must be dismissed.<sup>84</sup> The defendant, overcome with jealous rage, shoved his knee into his wife's stomach and declared that he would stomp the baby out of her, thereby fracturing the fetus' skull and killing it.<sup>85</sup> But it would seem possible under the new Louisiana statute to charge a defendant with willful murder of a fetus even if he did not know that the woman attacked was pregnant. His intent to kill or to inflict great bodily harm upon the mother, a sufficient *mens rea* for murder if she had died instead of the unborn child,<sup>86</sup> could be legally "transferred" to the fetus, a recognized doctrine in the bad-aim situation.<sup>87</sup> This much is fairly implied in the court's discussion of the relevant principles of feticide in *Gyles*.<sup>88</sup>

A similar extension of criminal homicide liability in the battery-plus-death situation<sup>89</sup> or robbery-murder case,<sup>90</sup> for example, where the pregnant robbery victim suffers a miscarriage due to fright and shock, is logically defensible,<sup>91</sup> but will involve the court in an unpleasant confrontation with

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people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best."

81. See, e.g., *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) (Marshall, C.J.).

82. LA. R.S. 14:3 (Supp. 1974), and comment thereto.

83. LA. R.S. 14:2(7), as amended by La. Acts 1976, No. 256.

84. See *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617 (Sup. Ct. 1970); CAL. PENAL CODE § 187 (Deering 1975).

85. *Id.*

86. See La. Acts 1976, No. 657 (first degree murder).

87. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 252 *et seq.* (1972) [hereinafter cited as LAFAVE & SCOTT].

88. 313 So. 2d at 801 (La. 1975).

89. See LA. R. S. 14:31(2)(a) (Supp. 1974) (misdemeanor manslaughter). An "intentional misdemeanor directly affecting the person" is limited to such offenses as assault, battery and false imprisonment. *Id.*, comment (2)(a).

90. See La. Acts 1976, No. 657 (second degree felony-murder).

91. See, e.g., *Ex parte Heigho*, 181 Idaho 566, 110 P. 1029 (1910) (defendant

the potential harshness of the felony-murder and battery-plus-death manslaughter rules.<sup>92</sup> Since an intent to kill or to inflict great bodily harm upon a human being is not required for felony-murder, and an unintended victim will suffice for battery-plus-death manslaughter,<sup>93</sup> the defendant's ignorance of the fact that the woman robbed or battered was pregnant would be immaterial. An examination of the jurisprudence of sister states having comparable enactments should prove helpful when it comes time to decide these perplexing ramifications of the new law.

Speculation that Louisiana's new definition of human being unconstitutionally abridges a woman's right to have an abortion is unfounded. The *Gyles* court<sup>94</sup> is careful to point out that any definition of criminal homicide which includes the fetus within its protection must be applied conformably with *Roe v. Wade*.<sup>95</sup> Nothing in that decision interdicts state power to punish the killing of a fetus which is effected without a pregnant woman's consent. A woman and her doctor who abort a non-viable fetus<sup>96</sup> run no risk of criminal liability under the new law, since a prosecution for feticide-type murder or manslaughter will be defeated under the omnibus Code provision which states that the defense of justification can be claimed "when for any reason the offender's conduct is authorized by law."<sup>97</sup>

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chargeable with manslaughter where spectator, not person assaulted, died of shock); cf. *State v. Knight*, 96 N.J.L. 461, 115 A. 569 (N.J. App. 1921) (conviction of attempted rape-murder upheld where victim died of shock and fright before actual penetration). See also *Commonwealth v. Couch*, 106 S.W. 830 (Ky. App. 1908) (reversing manslaughter conviction where defendant illegally discharged pistol on public highway and frightened a pregnant woman who suffered a miscarriage and died).

92. For a critique of battery-plus-death manslaughter, see *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Criminal Law*, 35 LA. L. REV. 402, 402-06 (1975).

93. LAFAVE & SCOTT at 252 *et seq.*

94. 313 So. 2d at 802.

95. 410 U.S. 113 (1973).

96. Viability of the fetus marks the point at which the state may proscribe abortion, except when it is necessary to preserve the life or health of the mother. See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973). The Court tells us that viability occurs somewhere between the twenty-fourth and twenty-eighth week of pregnancy. *Id.* at 160, criticized as unworkable in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 924 (1973).

97. LA. R. S. 14:18(3) (Supp. 1974).